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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (Original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, and THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANTS

GANSON J. BALDWIN
BUIST MURFEE ANDERSON
JOHN F. HANDY
Counsel for Appellants

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Opinions Below. The opinion of Mr. Justice Gavagan in the court of first instance, the New York Supreme Court, County of New York, is reported in 187 Misc. 1004. Upon appeal the Appellate Division, First Department, unanimously affirmed without opinion (271 App. Div. 1002). Upon further appeal the Court of Appeals modified and, as modified, unanimously affirmed with an opinion by Chief Judge Loughran reported in 297 N. Y. 1.

Jurisdictional Authority. Judicial Code § 237(a), 28 U. S. C. 344(a).

Statute Involved. The portion of the Abandoned Property Law of the State of New York (Chap. 1 of the Consolidated Laws of New York) applicable to life insurance companies, particularly Chapters 498 (Sec. 2) and 497 of the Laws of 1944 (pp. 1021-1025), and the statute which they amend, Chapter 697 of the Laws of 1943 (pp. 1383-1416, particularly Art. I, pp. 1384-1385, and Art. VII, pp. 1398-1401, and Arts. XIV and XV, pp. 1408-1415). The pertinent provisions are set forth in Appendix A (p. 35), and in the Record (R. 21-31), and are described in this brief at pages 5-7.

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Primary Objection to Statute.

New York cannot, under the guise of escheat, take sums neither held, nor owing, nor payable under the terms of these policies, to the prejudice of the companies and all of their policyholders.

Alternative Objection.

Even if any sums were due, New York lacks jurisdiction to escheat policies payable in foreign States by foreign companies.

The conflict with Pennsylvania, which claims jurisdiction to escheat all abandoned policies issued by Pennsylvania companies, can only be settled by this Court.

STATEMENT OF THE CASE

The Abandoned Property Law of New York forces payment to the State, in the nature of an escheat, of so-called "abandoned" life insurance and endowment policies, even though nothing whatsoever is held, owing or payable under the terms of the policies.

It is a new type of escheat legislation. Its history is in Appendix B (p. 47). Its pertinent provisions are in Appendix A (p. 35). The vital provisions and the construction placed upon them by the New York Court of Appeals are described at pages 5-8.

Constitutional Objections.

Appellants claim that the statute, as construed below, is repugnant to Article I, Section 10, of the Constitution because it impairs the obligations of the contracts, and to the Fourteenth Amendment because it takes the appellants' property without due process of law (R. 15-21, 64, 68-72).

The Court of Appeals upheld the statute except as to policies issued for delivery outside of New York (R. 62-63, 2-3, 60).

Questions Involved.

The first question is whether New York can declare these policies payable contrary to their terms, and deprive the companies of all defenses and other rights thereunder, in order to create an escheatable debt.

If that is constitutional, the second question is whether jurisdiction to escheat is in New York or in the State of incorporation of the insurance company, or in some other State. The same policy cannot escheat twice. Yet that is the predicament caused by the jurisdictional conflict between the New York and Pennsylvania statutes.

These questions have never been presented to this Court, or any Court, prior to this case.

Facts Are Conceded.

The facts are stated in the Complaint and are conceded to be correct (R. 2). Both sides moved for judgment upon such conceded facts (R. 2).

The Parties.

The plaintiffs are life insurance companies chartered by various States, about 100 years ago in most instances. They do business and are subject to process in nearly every State (R. 5). They have outstanding millions of policies totalling billions of dollars of insurance issued throughout the United States (R. 5-6).

The defendant-appellee is the Comptroller of the State of New York, the official charged with the duty of administering and enforcing the statute (R. 4-5). He receives all sums payable under it (R. 5).

Terms of the Policies.

Proof of death, age, etc., required.

These policies provide that they are payable only upon receipt by the insurance company of due proof of death, age and (as to endowments) survival of the specified period (R. 6-7, 14, 17, 65). No such proof has been furnished (R. 14, 17, 52, 65).

Age misstatements reduce insurance.

These policies contain a provision that, if the age of the insured was understated, as it frequently is, the amount of insurance shall be reduced to the amount which the premium would have purchased at the correct age (R. 8). The correct age is not known and is impossible to determine unless and until due proofs are furnished as required by the terms of the policies (R. 7, 8, 14).

Death from suicide, military service, aviation, etc., eliminates or reduces liability.

The policies also contain clauses which may exclude or reduce liability in case of suicide (R. 8), or in case of death caused by war or military service (R. 8), or aviation (R. 9), or if the insured was not living and in good health when the policy was delivered and the first premium paid (R. 8). Since no one knows whether the insured is living or dead, or if dead, when or how he died, it is impossible to know or determine the amount of liability, if any, in the absence of the due proofs required by the terms of the policies (R. 14, 17).

Defenses of fraud, impersonation, etc., may exist.

Defenses to the policies may exist because of the provisions referred to and also because of possible fraud, misrepresentation, impersonation, etc., in the inception of the insurance (R. 9), but it is impossible to determine what defenses may apply to any particular policy unless and until due proofs have been furnished as required by the policies (R. 14, 17).

Effect of the Statute.

New York attempts to escheat the full amount of each policy even though no one knows what sum, if any, might be payable if the conditions of the policy were performed (R. 14, 17).

It deprives the appellants of all right and opportunity to receive, consider and investigate claims under the policies, and to reject and resist unjust or fraudulent claims, or to adjust doubtful claims (R. 19).

It unjustly enriches New York at the expense of the companies and all of their policyholders (R. 19).

The Statute and Its Construction.

The statute itself says that "any moneys held or owing" under these policies "shall be deemed abandoned property" (Sec. 700, R. 23). Since nothing is held or owing under any of these policies (R. 7, 14, 17), the defendant construes "held or owing" to mean "the amount which will be payable if a proper claim were presented establishing" liability (R. 12). The Court of Appeals sustained this construction (R. 65-66, 60, 52). The text of Section 700, which is the heart of the statute, and its construction, are as follows (R. 23):

Text of Sec. 700.

Sec. 700. Unclaimed life insurance corporation moneys.

1. The following unclaimed property held or owing by life insurance corporations shall be deemed abandoned property:

(a) Any moneys held or owing by any life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

(b) Any moneys held or owing by any life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting age under the mortality table on which the reserves are based, exclusive of

(i) any policy which has within seven years been assigned, readjusted, kept in force by payment of premium, reinstated or subjected to loan, or

(ii) any policy with respect to which such corporation has on file written evidence received within

seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

(c) Any moneys held or owing by any life insurance corporation due to beneficiaries under policies issued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years.

* * * * * *

Construction of Sec. 700.

The construction of Section 700 by the defendant, and sustained below, is as follows (R. 12, 65-66, 60, 52):

> **"Amount due. Such amount is the amount which would be payable if a proper claim were presented establishing, as the case may be, that:**
>
> **"(1) the insured survived the endowment period, or**
>
> **"(2) the insured died on the day he reached the maximum age of the mortality table"** (which age varies from about 96 to 100, according to the mortality table used), "or
>
> "(3) the identity and right to payment of a person entitled to the proceeds of a policy when the fact of the insured's death has been proven to the insurer."

Improper assumptions as to age, death, survival, cause of death, etc.

Thus the policy terms are replaced by an assumption that the insured gave his correct age, which is frequently not so (R. 8; see *New York Life* v. *Veit*, 294 N. Y. 222, where the insured was sixteen years older than stated in the policy); and that the insured died upon reaching the maximum age of the mortality table, and that he did not die under circumstances which would reduce or eliminate liability; and, as to endowments, that he survived the endowment period; and that there were no other factors which would reduce or eliminate liability.

Residence.

The words "issued on the lives of residents of this state" in Section 700 were construed as follows (R. 11-12, 64-65, 60, 51):

> "If at the time of the contract an insured was a resident of the State of New York the item" (the policy) "comes within the provisions of the statute", and "a subsequent change of residence of the insured does not remove the item from the operation of this law", and "the words 'issued on the lives of residents of this state' refer to the residence of the insured at the time the contract was made and not to his residence at any later date".

Other Provisions of Statute.

The statute requires each company to report "abandoned" policies annually and to publish for claimants (Sec. 702, R. 25). In these reports and publications the insurance companies must admit liability (Sec. 701 (2a, b and d), R. 24; Sec. 702 (3c), R. 26). If no claimants appear the companies must pay the full amount of the policy to the State (Sec. 703, R. 26-27), less the cost of publication (Sec. 1409, R. 30). The statute purports to release the companies from liability to the policyholders and beneficiaries (Secs. 1404-1405, R. 27-28). The State undertakes to pay any policyholders who subsequently file claims (Secs. 1404, 1406, 1407, R. 27-29), in which event the State deducts a service charge of 1% (not less than $3), and no interest is allowed (Sec. 1407, R. 29). The State keeps all funds not claimed (State Finance Law, Sec. 95, R. 29-30). Penalties of $100 a day are assessed against any company which fails to comply with the statute (Sec. 1412, R. 30).

Decision Below Nullifies Terms of Contracts.

The Court of Appeals holds that these policies are matured and payable (R. 65) even though it is conceded that nothing is held, owing or payable under their terms (R. 7,

14, 16, 17), and that it is impossible to determine what sum, if any, might ever become due (R. 14). It holds that they "are not essentially different" from bank accounts (R. 64), and points out that bank accounts may escheat even though the passbooks are not produced (R. 65). It sees no distinction (R. 65).

It says that the statute does not nullify any defenses except the defense of "non-compliance with policy provisions calling for due proof of death or other designated contingency" (R. 66), and other exceptions not material here, but that exception in effect destroys any other defenses because it is concededly impossible to ascertain what defenses may apply to any particular policy in the absence of due proofs (R. 14). It also deprives the companies of all right and opportunity to consider and investigate claims, and to reject or resist unjust or fraudulent claims, or to adjust doubtful claims (R. 19). As to these objections the Court's only comment was: "Maybe, as the companies say, they cannot effectually prepare possible defenses without a proof of claim, but inconvenience of that kind does not nullify the statute" (R. 66).

It holds that the statute applies retroactively to policies issued prior to its enactment (R. 65-66). It calls the statute "procedural" and sees no obstacle to giving it "a retrospective application" (R. 66).

Alternative Question of Jurisdiction to Escheat, if Policies Are Subject to Escheat.

Only one State can have jurisdiction.

If these policies are to be treated as bank accounts and subject to escheat, as held below (R. 64, 65), the question is what State has jurisdiction to escheat. Obviously the same policy can only escheat to one State, and unless this Court determines the proper jurisdiction the companies will be exposed to double or multiple liability by the escheat of the same policy to another State or to suits by the policyholders in any State (R. 20).

Conflict between New York and Pennsylvania.

Pennsylvania and New York are already in conflict, and are attempting to escheat the proceeds of the same policies upon different theories of jurisdiction (Appendix B, pp. 47-50).

New York uses dual test of delivery and insured's residence at that time.

New York claims jurisdiction if the insured resided in New York when the policies were issued, many years ago (Sec. 700, R. 23; R. 11-12), and if (as added by the construction of the statute by the New York courts) the policies were issued for delivery in New York (R. 2-3, 51, 62-63, 64-65, 60).

Appellants believe proper jurisdiction is State where company is incorporated.

The appellants believe that the States in which the insurance companies are incorporated would be the proper jurisdiction (R. 16). This is also the Pennsylvania rule (Appendix B, p. 47).

Reasons: State of incorporation of insurance company is only known jurisdictional factor; is where policies are payable, etc.; is in accord with the decisions of this Court as to bank accounts, etc.; and is the only practical jurisdiction.

The State of incorporation (the domicile) of the insurance company is the only known factor upon which to base situs and jurisdiction, the domiciles of the missing policyholders being unknown (R. 50). It is also the place where the policies, by their terms, are payable (R. 7), and where the assets behind the policies are located (R. 6, 7), and where all claims must be made (R. 6), etc. (R. 6-7). It is the jurisdiction chosen by the policyholder himself since he selected a company in that State and sent his premiums there (R. 6). It is in accord with the decisions of this

Court that abandoned bank accounts escheat to the State where the bank is situated and where the account is payable; regardless of where the depositor resided; and its decisions that funds deposited in courts escheat to the State in which the court is located (authorities cited at pages 27-28 of this brief). No State has ever attempted to escheat accounts in banks incorporated in other States, or funds on deposit in courts located in other States. Even States which have copied the New York statute in other respects have limited their statutes to domestic companies, i.e., Massachusetts and New Jersey (Appendix B, p. 50).

The New York theory is believed to be unsound legally, and is clearly impractical in fact. The place of residence and of delivery long ago usually would be impossible to determine (R. 9-10, 17, 44), and a source of continual controversy and litigation. It is impractical to apply because policies are frequently delivered in one State upon the lives of residents of another State (R. 9). What bearing the residence, long ago, of the person whose life was insured has upon the question of escheat in the present is obscure, especially as he may never have had the slightest interest in the policy even at its inception (R. 9, 14, 19), and the owner of the policy may never have been in New York (R. 9).

The facts and the law on this alternative question of jurisdiction are more fully developed at pages 26-33 of this brief, and to avoid undue repetition we respectfully request that they be deemed a part of this statement of the case.

ASSIGNMENT OF ERRORS

Appellants assign the following errors (R. 68-72):

1. The Court of Appeals of the State of New York erred in holding that the statute known as the Abandoned Property Law of the State of New York, as amended, par-

ticularly Chapters 498 (Sec. 2) and 497 of the Laws of 1944 of the State of New York, and the statute which they amend, Chapter 697 of the Laws of 1943 of the State of New York, is valid and is not repugnant to the provisions of Article I, Section 10, of the Constitution of the United States, that "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *", although said statute, as construed by said Court of Appeals, provides that the plaintiffs, which are life insurance corporations incorporated in other States, must pay to the State of New York (as or in the nature of an escheat) the sums specified in the policies of life insurance and endowment policies, issued by the plaintiffs, and described in the Complaint, and must make reports and newspaper publications offering and promising payment and admitting liability, all contrary to and without performance of the terms of the policies, as set forth in the Complaint, particularly:

(a) the provisions that the furnishing of due proofs of death or other event, to the plaintiffs is a condition precedent to liability and to payment thereunder, it being conceded that no proofs of any kind have been furnished; and

(b) the provisions that if the age of the insured was understated, as concededly it frequently is, the amount of insurance under the terms of said policies shall be reduced to the amount which the premium would have purchased at the correct age, it being conceded that it is impossible to know or determine the correct amount unless and until due proofs are submitted as required by the terms of the policies; and

(c) the provisions excluding or reducing liability in case of suicide, or of death caused by war, or military service, or aviation, or if the insured was not living and in good health when the policy was delivered and the first premium paid, it being conceded that it

is impossible to know or determine the amount of liability, if any, unless and until due proofs are furnished as required by the terms of the policies.

2. Said Court of Appeals erred in holding that said statute is valid and is not repugnant to the Fourteenth Amendment to the Constitution of the United States providing that "* * * nor shall any State deprive any person of * * * property, without due process of law; * * *", although said statute, as construed by said Court of Appeals, requires the plaintiffs to make said payments, reports and publications, described in paragraph "1" hereof:

(a) contrary to and without performance of the policy provisions described in paragraphs "1(a), 1(b) and 1(c)" hereof: and

(b) even though many defenses, total or partial, may exist to any claims which could arise under the policies, particularly defenses based upon the provisions described in paragraphs "1(a), 1(b) and 1(c)" hereof, and also defenses based upon fraud, misrepresentation, impersonation, fictitious insureds, and other frauds, it being concededly impossible to determine what defenses may apply unless and until due proof of death, or other event, is furnished as required by the terms of the policies; and

(c) even though plaintiffs are thereby deprived of all right and opportunity to receive, consider and investigate claims under said policies, and to reject or resist unjust or fraudulent claims, or to adjust doubtful claims: and

(d) even though the amounts which might become payable, if anything, under said policies is entirely speculative, and the facts essential to determining the same are entirely unknown; and

(e) even though the assets and reserves of the plaintiffs are their general property in which they have

the beneficial ownership, and are not deposits or trust funds and are not ear-marked or held under or for any particular policy; and

(f) even though the effect and result is that the State of New York virtually liquidates and takes over this part of the plaintiffs' business and assets, and deprives them of their property and of the right to conduct such business as authorized by their charters granted by the States in which they are incorporated; and

(g) even though the State of New York has no jurisdiction to compel such payments and other acts (in the nature of escheat) in regard to any such policies, the proper jurisdiction (if any debts exist thereunder) being in the State of incorporation (the domicile) of the insurance company which issued the policies.

3. Said Court of Appeals erred in holding that such policies or the face amounts thereof are matured and represent "unclaimed life insurance funds" and "debtor obligations" susceptible to escheat, and subject to the jurisdiction of the State of New York for such purpose or a taking of that nature, and in sustaining the validity of the statute for that purpose, in that said holdings have no support in the record and are contrary to the conceded facts (mentioned briefly in these Assignments of Errors but more fully stated in the Complaint), and said holdings and statute are repugnant to Article I, Section 10, of the Constitution of the United States, and the Fourteenth Amendment thereto, in that they impair the obligations of said contracts and deprive plaintiffs of their property without due process of law.

4. If (contrary to the plaintiffs' contentions) any sums are to be deemed held or owing under such policies, said Court of Appeals nevertheless erred in holding that the State of New York has jurisdiction to take the same by said

statute as an escheat, or otherwise, in view of the conceded facts that the State of incorporation of each of the plaintiffs, not the State of New York, is the place where they are payable, and where all claims must be made, where the assets of the insurance company are located, where premiums are payable, where claims are paid and policy loans made, where the officials and records of the company are located, and where all other business relating to the policies is transacted, other than the solicitation of insurance and delivery of policies by local agents in various States, as more fully set forth in the Complaint; and that the whereabouts or domiciles of the holders of these "abandoned" policies are unknown; and that every year many thousands of policyholders move from one State to another; and that the residences of the insureds at the time that the policies were issued and also the place of delivery thereof (the factors upon which said Court holds the State of New York has jurisdiction) are unknown and impossible to determine and would always be uncertain and impractical factors (and the plaintiffs claim that such factors are of no legal or practical materiality in determining situs and jurisdiction for the purpose of escheat); and therefore the statute and the holding of said Court are repugnant to the Fourteenth Amendment to the Constitution of the United States in that they deprive the plaintiffs of their property without due process of law and expose them to full liability under the same policies to the State of New York and to the State having jurisdiction, and to the policyholders who may sue in any State.

5. Said Court of Appeals erred in affirming, as modified, and in failing to reverse, the judgments and orders of the lower courts of the State of New York, to wit, the judgment of affirmance of the Supreme Court of the State of New York dated March 19, 1947, entered upon the order of affirmance dated March 14, 1947, of the Appellate Division, First Department, of said Supreme Court, which

judgment and order affirmed the judgment of the Supreme Court of the State of New York, for the County of New York, the court of first instance, dated October 24, 1946, and said Court of Appeals erred in failing to declare said statute to be entirely void in its application to foreign life insurance companies and to said policies issued by them, and in so doing erred in rejecting the plaintiffs' contentions that said statute is repugnant to Article I, Section 10, of the Constitution of the United States, and the Fourteenth Amendment thereto, in that it impairs the obligations of said contracts and takes the plaintiffs' property without due process of law, under the facts set forth in the Complaint, all of which are conceded, and for the reasons therein stated.

SUMMARY OF ARGUMENT

(1) The statute impairs the obligations of the policies and takes property belonging to the insurance companies, and all their policyholders, without due process of law, for the benefit of New York.

The policies provide that they are payable only upon receipt of due proof of death, age, etc. No such proof has been furnished. Nothing is held, owing or payable. There is nothing to escheat.

The policies contain provisions which may reduce or eliminate liability if death was caused by suicide, war, or aviation, or if the age of the insured was misstated, or if there was a breach of condition as to the insured's good health when the policy was issued. As no one knows whether the insured is living or dead, or the cause of death, the correct age, etc., it is impossible to determine the amount of insurance.

The statute impairs these provisions by forcing payment in full to the State even though no one can possibly tell what sums if any, might ever become payable.

It nullifies all possible defenses, and forces payment arbitrarily. It deprives appellants of all opportunity to consider or investigate claims, or to reject or resist unjust or fraudulent claims, or to adjust doubtful claims. It virtually liquidates this portion of their business and transfers it to the State of New York.

The statute permits some policyholders to collect worthless or even fraudulent claims by merely waiting until the State collects from the insurance companies. If the State can resist such claims, even in part, it follows that the State had no right to collect from the companies in the first place.

(2) (Alternative Question of Jurisdiction.) If these policies are no different from bank accounts, as held below, then, like bank accounts, jurisdiction to escheat would be in the State where the institution is incorporated, which is also the place where the contracts would be payable, and where the assets behind the contracts are located, etc.

Jurisdiction to escheat (if these policies are subject to escheat) must be limited to one State.

The State of incorporation (the domicile) of the insurance company is the proper jurisdiction. It is the only known factor, the domiciles of the missing policyholders being unknown. It is the place where the policies are payable and where the assets behind the policies are located, etc. It is the jurisdiction selected by the policyholder himself since he selected a company in that State and sent his premiums there.

The decisions of this Court hold that abandoned bank accounts escheat to the State where the bank is situated and where the account is payable, regardless of where the depositor resided; also, that funds deposited in courts escheat to the State in which the court is located because the fund is deemed to be within the State and payable there.

No State has ever attempted to escheat accounts in banks incorporated in other States, or to escheat funds on deposit in a court located in another State.

Statutes of other States are all limited to policies issued by domestic corporations.

The right to escheat depends upon the present location of the property, not its origin. In this union of many sovereign States, situs and jurisdiction over intangibles must be based upon a common sense appraisal of the requirements of justice and convenience under the particular circumstances and for the particular purpose.

It is obviously more practical for the purpose of escheat that each company report to its State of incorporation, instead of to 48 States, each with its own statute and rules. In fact, no other method is workable at all, certainly not the New York theory.

New York claims jurisdiction if the insured resided in New York when the policies were issued, many years ago, and if the policies were delivered in New York. This is unsound under any recognized rule for determining situs or jurisdiction for the purpose of escheat. It is virtually impossible to apply because the residence and place of delivery are usually impossible to determine as to these old policies. It lacks the certainty and convenience which the State of incorporation of the insurance company would afford. It is unworkable as to policies delivered in one State upon the lives of residents of another State, which frequently occurs.

Where the insured resided many years ago is immaterial. He may never have had the slightest interest in the policy. The owner of the policy may never have been in New York. If the insured is living, it is likely that he has long since moved to another State. If he is dead, the beneficiary probably lives in one of the other 47 States, or in some foreign country.

Where the policy was delivered many years ago is immaterial because in escheat we are concerned with where the property is, not where it came from.

The Pennsylvania statute claims jurisdiction if a policy was issued by a Pennsylvania insurance company regardless of whether the insured resided in New York or elsewhere when the policy was issued. Both States want the proceeds of the same policies. These conflicting theories of jurisdiction can be settled only by this Court. The Pennsylvania rule has simplicity, precedent, and common sense to recommend it.

The cases cited by the Court of Appeals have no bearing upon escheat or upon jurisdiction for that purpose. They hold that two States may impose death taxes under some circumstances, but obviously the same policies cannot escheat to two States. They also hold that foreign corporations must comply with licensing requirements and regulations which has no analogy here. Others hold that corporations may be subjected to unemployment and premium taxes in any State where they are doing business, but clearly these policies cannot escheat to every State in the Union. There are also the cases holding that a debt can be attached in any State where the debtor can be served with process, but to apply such a theory to escheat would be to say that the State which first enacts an escheat statute gets jurisdictions.

ARGUMENT

Point I.

New York cannot make these policies payable contrary to their terms, and deprive the companies of all possible defenses, in order to escheat property which belongs to the insurance companies and all of their policyholders.

Nothing is due so nothing can escheat.

These life insurance policies provide that they are payable only upon receipt of due proof of death, age, and (in the case of endowments) survival of the specified period (R. 6-7, 14, 17, 65). No such proof has been furnished (R. 14, 17, 52, 65), and therefore nothing is payable (R. 14, 17; *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489; *O'Reilly* v. *Guardian Mutual*, 60 N. Y. 169; *Wachtel* v. *Equitable Life*, 266 N. Y. 345).

Where nothing is due, there is nothing to escheat.

The statute purports to escheat "monies held or owing" under these policies (Sec. 700, R. 23), but nothing is held or owing (R. 7, 14, 17). However, "held or owing" was construed below to mean "the amount which would be payable if a proper claim were presented establishing" liability (R. 12). A clearer case of impairing the obligation of a contract is hardly conceivable.

The Court of Appeals attempts to justify this by calling the policies matured (R. 65). It does not explain how or when they matured. If matured means due or payable, they certainly are not matured (R. 14, 17). No policyholder could maintain a suit under these policies without furnishing due proofs (authorities cited above). The State has no greater rights.

Due proofs of death, age, etc., essential to determining liability and amount,—not a mere formality like production of a bank book.

The Court of Appeals says that due proofs are unnecessary because the production of a bankbook is not essential to the escheat of a bank account (R. 64, 65), citing *Provident Inst. for Savings* v. *Malone*, 221 U. S. 660. The distinction is that a bank account is a liquidated debt payable unconditionally upon mere demand, the production of the bankbook being a formality having no bearing upon the existence or amount of the debt. These insurance policies are not debts, but are unperformed conditional contracts, and the facts essential to determining liability, or the amount of liability, are entirely unknown and speculative.

The requirement of these policies that they are payable only upon receipt of due proofs of death, age, etc., is not a mere formality. The insurer is entitled to know whether the insured is living or dead, and if death is shown it then becomes the insurer's right and duty to consider the cause of death, age, etc., because, under the terms of the policies, this may greatly reduce liability or eliminate it entirely (R. 8, 9, 14, 17). We refer particularly to the provisions as to age, suicide, war and aviation, good health when the policies were issued, etc. (R. 8, 9, 14, 17), which are described more fully earlier in this brief at pages 3-4. The validity of such provisions is unquestioned (*New York Life* v. *Vail*, 294 N. Y. 222, as to misstatement of age reducing a policy from $25,000 to $15,000; *Belsky* v. *N. Y. Life*, 255 App. Div. 288, aff'd 280 N. Y. 614, as to suicide; *Vanderbilt* v. *Travelers*, 112 Misc. 248, aff'd 202 App. Div. 738, aff'd 235 N. Y. 514, as to war clauses; *Geer* v. *Union Mutual*, 273 N. Y. 261, as to misrepresentations, whether innocent or fraudulent; and many others).

Although amount of coverage is speculative New York wants to collect in full.

No one knows whether the insured is dead or how death occurred, or the correct age, etc., and it is impossible to

determine these things where no proofs have been filed with the insurer (R. 8, 14, 17). If claims were filed under these policies, some might be entitled to collect in full, others in part, and others nothing at all. The State wants to collect in full on all.

By stripping the companies of all rights under the contracts the State takes money which legally and morally belongs to the companies and all of their policyholders.

The net result of this statute, as interpreted by the appellee and by the Court of Appeals, is to deprive the companies of their contract rights, and of all opportunity to consider and investigate claims, or to reject or resist unjust or fraudulent claims, or to adjust doubtful claims (R. 19). It virtually liquidates and takes over this part of their business and assets (R. 19), in which they have the beneficial ownership, no trust funds being involved, and nothing being earmarked or held for any particular policy either in fact (R. 7), or in law (*People* v. *The Security Life*, 78 N. Y. 114; *Uhlman* v. *New York Life*, 109 N. Y. 421). It gives to New York money which legally and morally belongs to the companies and all of their policyholders (R. 19).

The State, and many undeserving claimants, will be unjustly enriched at the expense of the companies and their other policyholders.

The statute says that the State will pay policyholders who later appear and demand their money (Secs. 1404, 1406, 1407, R. 27-9). If the State pays them in full, without investigating the merits (as distinguished from the mere identity of the claimants), it is obvious that many claimants will be unjustly enriched at the expense of the insurance companies. If the State investigates and successfully resists a claim, in whole or in part, the State keeps the money which should never have been taken from the insurance company in the first place. Indeed, the State could hardly resist or even investigate the merits of a

claim without conceding that there was no debt to escheat. The net result is that a policyholder could collect even a worthless or fraudulent claim by merely waiting until the State collects from the insurance company.

Although policies require proof of liability the companies are told to prove non-liability.

Instead of getting proof of liability, the companies are told to prove non-liability. The insured may be in China or Russia, yet the companies are told to prove that he is living or that he died in a manner not covered by the policy. The task would be impossible in most instances, even if large sums were wasted in the attempt. Neither the contracts nor the premium rates contemplate any such burden. Indeed it was to guard against any such thing that the policies specifically provide that they are payable, not at death, but only upon due proof of death, age, etc. (R. 6-7, 14, 17, 65). In the case of endowments, due proof that the insured survived the endowment period, and the correct age, is required (R. 7). When such proofs are received, the companies can see when, where, and how the insured died, and can properly determine the amount of liability, if any. Any investigations needed after receiving due proofs would be comparatively simple because at the very least the proofs would show when and where the death occurred, the age, etc.

Authorities show statute repugnant to Article 1, Sec. 10, and Fourteenth Amendment.

To nullify the terms and conditions of these policies in order to create an escheatable obligation is repugnant to Article 1, Sec. 10, and to the Fourteenth Amendment (*Lynch* v. *United States*, 292 U. S. 571; *Home Ins. Co.* v. *Dick*, 281 U. S. 397; *Boswell* v. *Security Mutual Life Ins. Co.*, 193 N. Y. 465, 473; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197; and many others). In the *Boswell* case the opinion states (p. 474), "In 2 Story on the Constitution (Sec. 1385) the learned author lays down the rule as follows: 'It

is perfectly clear, that any law which enlarges, abridges or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it.'"

State cannot dispense with performance of policy conditions, or impose new conditions.

State legislatures cannot tamper with contractual obligations merely because they may consider the provisions less important than do the contracting parties, as held in *Green* v. *Biddle*, 8 Wheaton 1, 84, as follows:

> "The objection to a law, on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

In *Bank of Minden* v. *Clement*, 256 U. S. 126, it was said that a contract "is not, by the Constitution, to be impaired at all" and that it "is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force" (p. 128).

A defense is property.

A defense is property, just as much as a right of action, and is equally protected by the Constitution. *Pritchard* v. *Norton*, 106 U. S. 124, 132, states the principle as follows:

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving only

those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice."

The Court of Appeals says that the statute does not take away these defenses except the defense that due proof has not been furnished (R. 66). That exception, vital in itself, simultaneously destroys all other defenses. It does so by forcing a premature assertion of these defenses in the face of the conceded fact that it is impossible to ascertain what defenses may apply until due proofs of death, age, etc., have been furnished (R. 8, 14, 17).

A defense is a right to resist a claim at the proper time, not a duty presently to assert hypothetical defenses to hypothetical claims.

A defense is a right to resist a claim at the proper time. It is not the doubtful privilege of embarking upon a costly and hopeless search for information about these missing policyholders in order presently to assert hypothetical defenses to hypothetical claims. The policies contain no such obligation, and none was ever intended. On the contrary, the very purpose of requiring due proof of death was to enable the companies to learn where, how, and when the death occurred, whereupon further investigations could be made to determine what defenses might then exist.

Purpose of due proofs is to give insurer a reasonable opportunity to investigate the merits of a claim; frequently proofs show on their face that little or nothing is due.

In *Aetna Life* v. *Moyer*, 113 F. 2d 974, 977, the Court said that the purpose of a policy provision "requiring due proof * * * is self-evident" and "is designed to give the insurer reasonable opportunity to investigate and test the validity of the claim". Frequently the proofs show on their face that little or nothing is payable under a policy (*Wachtel* v. *Equitable Life*, 266 N. Y. 345; *Rudolph* v. *John Hancock*, 251 N. Y. 208).

Unlike these policies, bank accounts are liquidated debts payable upon mere demand.

These unperformed conditional insurance contracts cannot be put in the same category with abandoned bank accounts where definite debts are payable unconditionally upon mere demand (*Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v. *California*, 263 U. S. 282).

If there be any gain from "abandoned" policies it belongs to the companies and all of their policyholders.

The reason that no claims have been made under some of these policies is no doubt because the policyholder knew that the policy was not enforceable for some reason (R. 9, 19). Any benefit the companies may derive from policies under which no claims are made belongs to the companies, and their policyholders, since they bear the burden of excessive claims on other policies (R. 19), just as any business has its profits and losses. The bulk of the country's life insurance is carried in mutual companies (Enc. Britannica, 14th Ed., Vol. 14, p. 55; Enc. Am., Vol. 15, p. 187).

Point II.

(Alternative Question of Jurisdiction)

Property can escheat only to one State. New York lacks jurisdiction and payment to it will be no defense to escheat in the State having jurisdiction, or to suits by policyholders in any State. Due process requires jurisdiction (*Pennoyer* v. *Neff*, 95 U. S. 714, 733).

Appellants believe that the State of incorporation (the domicile) of the insurance company is the proper jurisdiction, if these policies are subject to escheat at all (R. 16). Their reasons follow.

Why State of Incorporation Would Have a Superior Claim to Jurisdiction If Policies Are Subject to Escheat.

(1)

Is only known jurisdictional factor since domiciles of missing policyholders are unknown.

It is the only known factor upon which situs and jurisdiction can be based, because the domiciles of the missing policyholders or beneficiaries are unknown (R. 50). The domicile of the insurance company is always known and never changes.

(2)

Is place where policies are payable, etc.

It is the place where the policies are payable by their terms (R. 7), and where the assets behind the policies are located (R. 6, 7), and where all claims (R. 6) and other transactions in connection with the policies must be made under the terms thereof (R. 6-7).

(3)

Policyholders chose company in foreign State.

It is the jurisdiction selected by the policyholder himself since he chose to place his insurance in a company incorporated in that State and sent his money there (R. 6).

(4)

Bank accounts escheat where bank is located.

It is in accord with the decisions of this Court that abandoned bank accounts escheat to the State in which the bank is situated and where the account is payable, regardless of where the depositor resided (*Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v. *California*, 263 U. S. 282).

No State has ever attempted to escheat accounts in banks incorporated in other States.

In the *Anderson* case it was held that Kentucky had jurisdiction to escheat deposits in a Kentucky bank, because the bank was located there, and the funds were on deposit there, and payable there, "and hence are subject to the state's domination" (p. 241), being "a part of the mass of property within the state whose transfer and devolution is subject to state control" (p. 248). In the *Security Bank* case it was held that California had jurisdiction to escheat deposits in a California bank, because the bank was located there, and the money was on deposit there, and payable there. It linked the debt with the assets behind the debt by pointing out that, in effect, a deposit "gives the bank merely the right to use the depositor's money until called for by him" (p. 286). It is "intangible property within the state" (p. 285).

(5)

Court funds escheat where Court is located.

It is in accord with the holding of this Court that funds on deposit in a court escheat to the State in which the court is located, because the fund is deemed to be within the State and is payable there (*U. S.* v. *Klein*, 303 U. S. 276, also cited at 106 F. 2d 213, cert. denied 308 U. S. 618).

No State has ever attempted to escheat funds on deposit in a court located in another State.

In the *Klein* case it was held that Pennsylvania had jurisdiction to escheat because the funds due to the missing bondholders of the Pennsylvania Railroad were on deposit in and subject to distribution by the United States District Court in Pennsylvania. No one would seriously suggest that the State where the bonds were originally sold or delivered would have jurisdiction to escheat—yet such is the theory applied by the Court of Appeals to the policies in the case at bar.

(6)

Statutes of other States restricted to domestic companies.

It is in accord with similar statutes in other States all of which are limited to policies issued by domestic corporations, i.e., the Pennsylvania, Massachusetts and New Jersey statutes cited and described in Appendix B (p. 47). New York is the only State which attempts to escheat policies issued by foreign companies. Even the New York statute was limited to domestic companies until the amendments of 1944, which caused the present litigation, and at the next session of the New York Legislature, in 1945, a bill was passed to repeal the amendments and limit the statute, as before, to domestic companies, but the Governor vetoed the bill for other reasons (Appendix B, p. 49).

(7)

Where contract originated is immaterial.

It is in accord with the principle that escheat is a reverting of title to the sovereign within whose domain the property is located, regardless of where the property originated. An automobile purchased in New York, but abandoned in California, escheats to California. If a New Yorker sends his money to a Kentucky bank, Kentucky has jurisdiction, because it has primary jurisdiction over the debtor and over "the mass of property" which stands behind the debt (*Anderson National Bank* v. *Luckett*, 321 U. S. 233, *supra*).

(8)

Practical considerations important in determining jurisdiction of intangibles.

It is in accord with the principle that in this union of many sovereign states, situs and jurisdiction should be based upon "a common-sense appraisal of the requirements of justice and convenience in particular conditions", as stated by Judge Cardozo in *Severnoe Securities* v. *L. & L. Ins. Co.*, 255 N. Y. 120 (1931). He analyzed the situs of debts as follows:

> (page 123) "* * * The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor" (but in the case at bar this is concededly unknown) "for others, the domicile or place of business of the debtor * * *" (the State of incorporation of the insurance company is always known) "for others, any place where the debtor can be found" (the insurance companies do business in practically every State but property can escheat to only one State). "At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions * * * *"

(9)

Wasteful to report to 48 States, each with different statute and rules.

It is practical because each company would report only to its State of incorporation, as in the case of bank accounts, etc., instead of to possibly 48 States, each with its own statute and rules. The preparation of these reports involves substantial expense for which the companies are not compensated (R. 12).

Erroneous Theory of Decision Below.

New York claims jurisdiction to escheat under this statute if the policies were upon the lives of persons who were residents of New York many years ago when the policies were issued (Sec. 700, R. 23; R. 11-12), with the further proviso, added by the construction of the New York courts, that the policy must have been issued for delivery in New York (R. 2-3, 51, 62-3, 64-5, 60). This is unsound for the following reasons.

(1)

Place of residence and delivery years ago immaterial, and impractical to apply.

The residence many years ago is immaterial under any recognized rule for ascertaining situs or jurisdiction for this purpose (R. 43, 44). The place of delivery is equally immaterial. Combining the two does not help. On the contrary, one might well ask what happens to policies delivered in one State upon the lives of residents of another State (R. 9).

(2)

Place of residence and delivery long ago usually impossible to determine and source of endless controversy.

It is impractical because the residence of the insured many years ago, and the place of delivery of these old

policies, are unknown and usually impossible to determine (R. 9-10, 17, 44). At best, they would be uncertain factors open to endless controversy and litigation. It has never been customary in the insurance business to inquire into the legal residences of persons taking out insurance, and many who gave New York addresses may have resided in other States (R. 9-10). The companies have no knowledge of or practical means of determining their legal residences (R. 9-10).

(3)

Conflict with Pennsylvania statute.

It is in direct conflict with the Pennsylvania statute which claims jurisdiction to escheat if the policy was issued by a Pennsylvania insurance company, regardless of where the insured resided or where the policy was delivered (Appendix B, p. 47). Obviously one of these theories of jurisdiction is wrong since the same policies cannot escheat to both New York and Pennsylvania. This jurisdictional conflict can only be settled by this Court. The Pennsylvania rule (if these policies are to be subjected to escheat at all) seems sounder from every view, including simplicity, practicability and precedent.

(4)

Owner of policy may never have been in New York.

The residence, when the policy was issued, of the person whose life was insured is immaterial for the further reason that he may never have had the slightest interest in the policy, even at its inception (R. 9, 14, 19). The insurance may have been obtained by an employer, creditor, partner, husband, wife, parent, or other person (R. 9, 14, 19). It may have been assigned (R. 8-9). The owner or beneficiary of the policy may never have been in New York (R. 9). The last known address of the insured or beneficiary may be another State (R. 9).

(5)

Escheat relates to present location of property, not its origin.

The place of delivery of the policy, many years ago, is immaterial because escheat has to do with the present location of the property, not its origin long ago.

Cases Cited in Decision Below Not Applicable to Escheat.

The Court of Appeals does not discuss the legal, factual, or practical factors involved, or the jurisdictional conflict with the Pennsylvania statute. It holds tersely that "the policies were issued upon the lives of residents of this State and were delivered within its borders by corporations doing business therein" and "the core of the debtor obligations of the plaintiff companies was created through acts done in this State under the protection of its laws and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature" (R. 65), citing the following cases involving multiple jurisdiction for purposes of taxation, attachment, etc., none of which are relevant to escheat because the same property can only escheat to one State.

Curry v. McCanless, 307 U. S. 357, holds that two States may impose death taxes under some circumstances. However, the same property cannot escheat to two States.

Hoopeston Co. v. Cullen, 318 U. S. 313, holds that if a reciprocal insurance association does business in a foreign State, it must comply with its licensing requirements and regulations. No possible analogy to escheat is to be found in that case.

International Shoe Co. v. *Washington*, 326 U. S. 310, and *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, hold that corporations may be subjected to unemployment and discriminatory premium taxes in any State where they are doing business. If this rule applied to escheat, the appellants might be required to pay the full amount of each policy to nearly every State in the Union.

Harris v. *Balk*, 198 U. S. 215, *Morris Plan Bank* v. *Gunning*, 295 N. Y. 324, and *Feinman* v. *Marks*, 294 N. Y. 367, hold that a debt can be attached in any State where the debtor can be served with process. The first attachment reduces the debt *pro tanto* so that the debtor will not be exposed to multiple liability. The vigilant creditor takes precedence. To apply such a theory to escheat would be to say that the State which first enacts an escheat statute gets jurisdiction.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully,

Ganson J. Baldwin,
Buist Murfee Anderson,
John F. Handy,
Counsel for Appellants.

November 26, 1947.

APPENDIX A.

Pertinent Provisions of Statute.

Text of the Abandoned Property Law of the State of New York, as amended, insofar as it applies to life insurance companies, being Chapter 697 of the Laws of 1943, as amended by Chapters 497 and 498 (Sec. 2) of the Laws of 1944, also known as Chapter 1 of the Consolidated Laws of the State of New York.

NOTE:

In Sec. 103 the words in italics were added, and the words in brackets were deleted, by Chapter 498 (Sec. 2) of the Laws of 1944, thereby making the statute apply to foreign life insurance corporations.

In Secs. 700, 701, 702 and 703, the words in italics were added, and the words in brackets were deleted, by Chapter 497 of the Laws of 1944.

ARTICLE 1—SHORT TITLE; DECLARATION OF POLICY; DEFINITIONS

§101. Short title.

This chapter shall be known and may be cited as the "Abandoned Property Law."

§102. Declaration of policy.

It is hereby declared to be the policy of the state, while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state, and this chapter shall be liberally construed to accomplish such purpose.

§103. Definitions.

* * *

(d) "[Domestic] Life insurance corporation" means any [authorized] insurer corporation [incorporated and] organized under [any] *the* laws of this state [having power] *or any foreign corporation authorized* to do either one or both kinds of insurance business authorized in paragraphs one and two of section forty-six of the insurance law, as amended from time to time.*

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*NOTE:

The Insurance Law, Sec. 46, paragraphs 1 and 2, read as follows:

1. "Life insurance," meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured; and optional modes of settlement of proceeds.

2. "Annuities," meaning all agreements to make periodical payments where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of paragraph one.

ARTICLE VII—UNCLAIMED LIFE INSURANCE FUNDS

§700. Unclaimed [domestic] life insurance corporation moneys.

1. The following unclaimed property held or owing by [domestic] life insurance corporations shall be deemed abandoned property:

(a) Any moneys held or owing by any [domestic] life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

(b) Any moneys held or owing by any [domestic] life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting age under the mortality table on which the reserves are based, exclusive of

(i) any policy which has within seven years been assigned, readjusted, kept in force by payment of premium, reinstated or subjected to loan, or

(ii) any policy with respect to which such corporation has on file written evidence received within seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

(c) Any moneys held or owing by any [domestic] life insurance corporation due to beneficiaries under policies issued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years.

2. Any such abandoned property held or owing by a [domestic] life insurance corporation to which the right to receive the same is established to the satisfaction of such corporation shall cease to be deemed abandoned.

§701. Annual report of abandoned property.

1. On or before the first day of April in each year every [domestic] life insurance corporation shall make a verified

written report to the state comptroller, which shall contain a true and accurate statement, as of the first day of January next preceding, of all abandoned property specified in section seven hundred, held or owing by it.

2. Such report shall set forth:

(a) The name and last known address of any person or persons appearing from the records of such [domestic] life insurance corporation to be entitled to receive any such abandoned property;

(b) The amount appearing from the records of such corporation to be due;

(c) The policy number and policy age of the insured;

(d) The date such abandoned property was payable;

(e) The names and last known addresses of each beneficiary appearing in the records of the insurer; and

(f) Such other identifying information as the state comptroller may require.

3. Such report shall be in such form and the abandoned property listed shall be classified in such manner as the state comptroller may prescribe. Names of persons appearing to be entitled to such property or of beneficiaries appearing in such report shall be listed in alphabetical order within each such classification.

4. In case any [domestic] life insurance corporation shall on the first day of January in any year neither hold nor owe any abandoned property specified in section seven hundred, it shall on or before the first day of April next succeeding make a verified written report to the state comptroller so stating.

§702. Publication of list of abandoned property.

1. Within thirty days after making a report of abandoned property pursuant to the provisions of section seven hundred one, such life insurance corporation shall cause to be published a notice entitled: "NOTICE OF NAMES OF PERSONS APPEARING AS OWNERS OF CERTAIN UNCLAIMED PROPERTY HELD BY (name of life insurance corporation)."

2. Such notice shall be published once [in two newspapers published in the city or village] *a week for two successive weeks in a newspaper published in the county of the state* in which is located the last-known address of the holder of a policy under which such abandoned property is payable. [; provided, however, that if such address is in the city of New York, such publication shall be in two newspapers published in the county where such address is located. If there is only one newspaper published in any such city or village, such notice shall be published in such newspaper and in a newspaper published in the county where such address is located. If there are no newspapers published in such city or village, then such publication shall be in two newspapers published in the county where such address is located, or, if there is only one such newspaper published in such county, then in such newspaper, or, if there are no newspapers published in such county, then in a newspaper published in an adjacent county. All newspapers in which such notice shall be published shall be newspapers printed in the English language.] *If there are no newspapers published in such county then such notice shall be published in a newspaper published in an adjacent county. If such last-known address is outside of the state of New York, such publication shall be in such newspaper published in this state as may be designated by the state comptroller. Such notices shall be published in newspapers printed in the English language.*

3. Such notice shall, in accordance with the classification prescribed by the state comptroller for the report pursuant to the provisions of section seven hundred one, set forth:

(a) the names and last known addresses which were in such report, of all persons appearing to be entitled to any such abandoned property amounting to ten dollars or more. Such names shall be listed in alphabetical order. [If, however, such life insurance corporation has reported abandoned property payable on policies whose holders' last known addresses are in more than one city or village or, in the case of New York city, more than one county, the names shall be listed alphabetically for each such city, village or county and such notice shall include only the names of the persons appearing to be entitled to abandoned property payable on policies whose holders' last known addresses are in such city, village or county;]

(b) such other information as the state comptroller may require; and

(c) a statement

(i) that a report of unclaimed amounts of moneys held or owing by it has been made to the state comptroller and that a list of the names of the person or persons appearing from the records of such life insurance corporation to be entitled thereto is on file and open to public inspection at its principal office or place of business in any city, village or county where any such abandoned property is payable;

(ii) that such unclaimed moneys will be paid by it on or before the succeeding thirty-first day of August to persons establishing to its satisfaction their right to receive the same; and

(iii) that in the succeeding month of September, and on or before the tenth day thereof, such unclaimed moneys still remaining will be paid to the state comptroller and that it shall thereupon cease to be liable therefor.

4. Such life insurance corporation shall file with the state comptroller on or before the tenth day of May in each year proof by affidavit of such publication.

§703. Payment of abandoned property.

1. In such succeeding month of September, and on or before the succeeding tenth day thereof, every such [domestic] life insurance corporation shall pay to the state comptroller all abandoned property specified in such report, excepting such abandoned property as since the date of such report shall have ceased to be abandoned.

2. Such payment shall be accompanied by a statement setting forth such information as the state comptroller may require relative to such abandoned property as shall have ceased to be abandoned.

NOTE:

Subsequent to the commencement of the action, the following section was added by Ch. 452 of the Laws of 1946, approved April 4, 1946:

§707. Reimbursement for claims paid by insurers.

Any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller.

ARTICLE XIV—GENERAL PROVISIONS

§1400. Statutes of limitations not a bar.

The expiration of any period of time specified by law, during which an action or proceeding may be commenced or enforced to secure payment of a claim for money or recovery of property, shall not prevent any such money or property from being deemed abandoned property, nor affect any duty to file a report required by this chapter or to pay or deliver to the state comptroller any such abandoned property; and shall not serve as a defense in any action or proceeding by or on behalf of the state comptroller to compel the filing of any report or the payment or delivery of any abandoned property required by this chapter or to enforce or collect any penalty provided by this chapter.

§1404. Assumption of liability by the state.

1. The care and custody * * *

(i) * * * of all abandoned property paid to the state comptroller pursuant to this chapter, is hereby assumed for the benefit of those entitled to receive the same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law; less any lawful deductions, which cannot be paid from the abandoned property fund.

* * *

2. Any person, copartnership, unincorporated association or corporation making a payment of abandoned property to the comptroller shall immediately and thereafter be relieved and held harmless from any or all liability for any claim or claims which exist at such time with reference to such abandoned property or which may thereafter be made or may come into existence on account of or in respect of any such abandoned property.

3. No action shall be maintained against any person, copartnership, unincorporated association or corporation, or any officer thereof, for

(a) the recovery of abandoned property paid to the state comptroller pursuant to this chapter or for interest thereon subsequent to the date of the report of such abandoned property to the state comptroller pursuant to this chapter; * * * or

(c) damages alleged to have resulted from any such payment.

§1405. Interest not to run after report of abandoned property.

Notwithstanding any other provision of law, no owner of abandoned property shall be entitled to receive interest on account of such abandoned property from and after the date a report of such abandoned property is made to the state comptroller pursuant to this chapter, whether or not he was entitled to interest on such property prior to such date. No claimant to abandoned propery heretofore paid to the state comptroller shall be entitled to receive interest on account of such property, whether or not he was entitled to interest on such property prior to such payment.

§1406. Claims for abandoned property heretofore or hereafter paid to the state.

1. (a) Claim may be filed with the state comptroller for any abandoned property heretofore paid to the state or hereafter paid to the state comptroller pursuant to this chaper * * * (Note: Part omitted is not pertinent to life insurance.)

(b) The comptroller shall possess full and complete authority to determine all such claims and shall forthwith send written notice of such determination to the claimant. At any time within four months thereafter, such claimant may apply for a hearing and a redetermination of his

claim. After an appropriate hearing on notice, before the comptroller or person duly designated by him, the comptroller shall make and serve his final determination, which alone shall be reviewable by application to the supreme court, Albany County, upon not less than ten days' notice to the comptroller.

(c) The comptroller, or any person duly designated by him, is empowered to take testimony and proofs, under oath, upon such hearing, and shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to such hearings.

* * *

§1407. Payment by state comptroller.

Any claim which is allowed by the state comptroller or ordered to be paid by him by a court of competent jurisdiction pursuant to the provisions of section fourteen hundred six, together with such costs and disbursements as may be allowed by the court, shall be paid out of the abandoned property fund and the comptroller shall not be liable in any action for any claim paid by him in good faith. There shall be deducted by the state comptroller from any claim allowed or the amount, other than costs and disbursements allowed by the court, of any claim ordered to be paid by him by a court of competent jurisdiction, one per cent, but in no event less than three dollars, from any such payment as a service charge, and such amount shall remain in the abandoned property fund.

If during any session of the legislature there are insufficient moneys in the abandoned property fund to pay all claims which have been allowed by the state comptroller or ordered to be paid by him by a court of competent jurisdiction, the state comptroller shall so certify to the legislature, which shall appropriate from the general fund to the abandoned property fund * an amount sufficient to pay such claims.

NOTE:

Whenever the Abandoned Property Fund exceeds $750,000, the excess becomes the absolute property of the State of New York, under the State Finance Law of New York, Sec. 95.

§1408 Verification.

Any report required to be verified by this chapter shall be verified, if made by a person by such person, if made by a partnership by one of the members thereof, if made by an unincorporated association or private corporation by the president or by a vice-president and one other principal officer thereof, and if made by a public corporation by the chief fiscal officer thereof.

§1409. Payment for publication.

Any amount paid by a person to a newspaper or newspapers for any publication of names as required by this chapter shall be charged prorata against all abandoned property held or owing by such person at the time of such publication, except abandoned property of individual amounts of less than ten dollars.

§1410. Designation of newspapers.

Any notice required by this chapter shall be published in such newspapers as shall be designated by the state comptroller, except that in no case shall a notice be published in a newspaper other than one specified in the section requiring such publication.

§1411. Waiver of publication.

The state comptroller may waive the publication of any notice required by this chapter, except a notice required

by section fourteen hundred two, whenever in his opinion the cost of publishing such notice would be unreasonable in relation to the amount of abandoned property.

§1412. Penalty for failure to report or file.

Any person failing to make any report or to file any affidavit required by this chapter shall forfeit to the people of the state the sum of one hundred dollars for each day such report or affidavit shall be delayed or withheld, except that the state comptroller may extend the time for making any such report or filing any such affidavit and may waive the payment of any penalty or part thereof provided for by this section.

§1413. Penalty for fraudulent returns.

The making of a willful false oath in any report required under the provisions of this chapter shall be perjury and punishable as such according to law.

§1501. Constitutionality.

If any part, provision or section of this chapter, or the application of any such part, provision or section in any particular respect, shall be adjudged by any court of competent jurisdiction to be unconstitutional or ineffective in whole or in part, such judgment shall be confined in its operation to the particular provision or section or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect, impair or invalidate the remainder of such provisions or sections or their application in other respects; and to the extent that such provisions or sections are not unconstitutional or ineffective, they shall remain in full force and effect.

APPENDIX B.

History of Statutes Attempting to Escheat Life Insurance Policies.

Pennsylvania

The first statute of this kind was enacted by Pennsylvania in 1937 (Act of 1937, June 25, Pamphlet Laws 2063). Some minor amendments were made in 1939 (Act of 1939, June 24, Pamphlet Laws 660). The statute may also be found in Purdon's Pennsylvania Statutes, Title 27, Sec. 434, *et seq.*

This statute applies to policies issued by companies incorporated in Pennsylvania, regardless of whether the insured was a resident of Pennsylvania and regardless of where the policy was delivered.

It preceded by two years the New York statute, which was limited to domestic companies until the amendment of 1944, whereby New York attempts to escheat policies issued by companies incorporated in Pennsylvania and other States, if the insured resided in New York when the policy was issued, and if (as construed by the New York Court of Appeals) the policy was delivered in New York. Both States claim jurisdiction to escheat such policies.

The pertinent provisions of the Pennsylvania Statute are as follows (Act of 1937, June 25, Pamphlet Laws 2063; Purdon's Penn. Stat., Title 27, Section 434 *et seq.*):

> "Section 2". (Purdon's 435) "Definitions. * * * 'Company'. The word company shall include * * * insurance * * * corporations * * * incorporated * * * under the laws of this Commonwealth * * *."
>
> * * *
>
> "Section 3". (Purdon's 436a 3) "* * * Every company shall make a report of the proceeds of any policy of life * * * insurance awaiting due proof for payment,

or the surrender values of policies which have been surrendered by the policyholder or insured, or have been surrendered or are surrenderable at the option of the insurer under the contractual agreement between the insurer and the insured, * * * which have been held and are owing by any company, as hereinabove defined, and have been unclaimed by and unpaid to the lawful owner thereof, or to the person or persons legally entitled thereto, for seven or more successive years * * *"

* * *

Provisions are also made for publication for claimants (Section 5; Purdon's 438), and for escheat by court proceedings (Section 8; Purdon's 441), and an alternative procedure for payment to the State without legal proceedings (Section 9; Purdon's 442).

New York

In 1939 New York first enacted such a statute (Chapter 923 of the Laws of 1939, which added Sections 295-299 to the Insurance Law of New York, and added Section 44[h] to the State Finance Law).

It applied to policies issued by companies incorporated in New York, regardless of where the insureds resided or where the policies were delivered. It did not apply to companies incorporated in other States.

The New York Life Insurance Company attacked the statute as unconstitutional and obtained an injunction pendente lite. (*New York Life* v. *Pink et al.*, N. Y. Law Journal, December 21, 1939, p. 2257, N. Y. Supreme Court, N. Y. County, Special Term, Part III, McCook, J.; not officially reported. Mr. Justice McCook's opinion did not pass upon the constitutionality of the act but merely held that it was sufficiently doubtful to justify the preliminary injunction.)

Before that case was tried, the statute was amended (Chapter 602 of the Laws of 1940), whereupon the case was

discontinued. The amendment limited the statute to policies issued by New York companies upon the lives of residents of New York. It still applied only to domestic companies.

In 1943 the statutes mentioned were repealed and re-enacted in substance as Article VII of the Abandoned Property Law (by Chapter 697 of the Laws of 1943). It still applied only to domestic companies. Other portions of the Abandoned Property Law, which is a codification of various New York statutes relating to escheat, cover real property and many types of unclaimed personal property, including deposits in banks and courts located in this State. Only the provisions as to life insurance apply to companies incorporated in other States, and attempt to escheat conditional contracts, as distinguished from debts or deposits, and to take jurisdiction of property located in other States.

Not until 1944 was there any attempt to make the statute applicable to foreign life insurance companies. This was done by the statutes which are attacked in the case at bar as unconstitutional (Chapters 498 [Sec. 2] and 497 of the Laws of 1944, amending Chapter 697 of the Laws of 1943, copies of the pertinent provisions being set forth in Appendix A).

At the next session of the legislature, in 1945, a bill was passed to repeal the 1944 amendments and limit the statute, as before, to domestic companies (Assembly Introductory No. 2268, Print No. 2551), but the Governor vetoed the bill for other reasons, particularly a clause, opposed by the domestic companies, which would have made the statute applicable, as originally, to any such policies issued by domestic companies regardless of whether they were delivered in New York or elsewhere.

Shortly after the veto the suit at bar was commenced on June 9, 1945. The plaintiffs moved for an injunction

pendente lite whereupon the defendant agreed to postpone enforcement of the statute as against foreign companies pending the outcome of the case.

New Jersey

The New Jersey statute enacted in 1946 (Ch. 154 of the Laws of 1946, approved April 25, 1946; revised statutes 17:34-49 *et seq.*) is essentially a copy of the New York statute except that it is limited to domestic companies, i.e. "any life insurance company incorporated under the laws of this state", and is further limited to policies "issued on the application of a resident of this state * * * and which are payable to any person whose last known address according to the company's records is within this state" (R. S. 17:34-49).

Massachusetts

The Massachusetts statute also enacted in 1946 (Ch. 455 of Laws of 1946, approved June 6, 1946; General Laws of Massachusetts, Tercentenary Ed., Ch. 175, Secs. 149[a], [b], [c] and [d]) is essentially a copy of the New York statute except that it is limited to "domestic" companies.

Connecticut

A recent Connecticut statute, Public Act 508 of 1947, provides for the escheat of tangible and intangible property generally, but exempts "the proceeds of life insurance policies awaiting the happening of a contingency upon the happening of which such proceeds shall become payable, or surrender values of policies, or portions of premiums held to the credit of policyholders by life insurance companies having no capital stock" (Sec. 8). It allows the owners of escheated property to assert claims against the State (Sec. 4).